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9 UNITED STATES DISTRICT COURT
10 SOUTHERN DISTRICT OF CALIFORNIA
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12 CARL SIMMONS,

13 Petitioner,

14 v.

15 TERHUNE,
16

17 Respondent.
18

CASE NO: 08-CV-1127 W (POR)

**ORDER DENYING MOTION
FOR CERTIFICATE OF
APPEALABILITY**

19 On January 28, 2009, Petitioner Carl Simmons (“Petitioner”), a state prisoner
20 proceeding *pro se*, filed a second amended petition for a writ of habeas corpus pursuant to
21 28 U.S.C. § 2254, and a motion for leave to proceed *in forma pauperis* (“IFP”). This Court
22 denied the IFP motion on February 17, 2009 for failure to demonstrate an inability to pay
23 the filing fee.

24 On March 16, 2009, Petitioner filed a notice of appeal. The Court of Appeals
25 construed this as a motion for a Certificate of Appealability (“COA”), and directed this
26 Court to decide the motion. For the reasons stated below, the Court **DENIES** the motion
27 for a COA.
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1 **I. DISCUSSION**

2 Petitioner is a prisoner at Calipatria State Prison. On June 20, 2008, Petitioner filed
3 a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. The original petition was
4 dismissed without prejudice for failure to pay the filing fee or provide adequate proof of
5 Petitioner's inability to pay. On August 6, 2008, Petitioner filed a First Amended Petition
6 as well as a motion for leave to proceed IFP. On January 9, 2009, this Court denied the
7 motion for leave to proceed IFP for failure to provide the court with sufficient information
8 to determine Petitioner's financial status.

9 On January 28, 2009, Petitioner filed a second amended complaint and IFP motion,
10 which included an "Inmate Statement Report." The statement indicated a \$35.78 balance
11 in Petitioner's prison trust account. In light of this balance, on February 19, 2009, this
12 Court denied the IFP motion, finding that Petitioner was able to pay the \$5.00 filing fee
13 per 28 U.S.C. § 1914(a). Petitioner then filed a notice of appeal on March 16, 2009. The
14 Court of Appeals construed the appeal as a motion for a COA and ordered this Court to
15 decide the motion.

16 Under the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-
17 132, 110 Stat. 1214 (1996) ("AEDPA"), a state prisoner may not appeal the denial of a
18 section 2254 habeas petition unless he obtains a COA from a district or circuit judge. 28
19 U.S.C. § 2253 (c)(1)(A); see also United States v. Asrar, 116 F.3d 1268, 1269-70 (9th Cir.
20 1997) (holding that district courts retain authority to issue certificates of appealability under
21 the AEDPA).

22 In deciding whether to grant a COA, a court must either indicate the specific issues
23 supporting a certificate or state reasons why a certificate is not warranted. Asrar, 116 F.3d
24 at 1270. A court may issue a COA only if the applicant has made a "substantial showing"
25 of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). This requirement means:

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27 Where a district court has rejected the constitutional claims on the merits, the
28 showing required to satisfy section 2253 (c) is straightforward: The petitioner
must demonstrate that reasonable jurists would find the district court's
assessment of the constitutional claims debatable or wrong ... When the
district court denies a habeas petition on procedural grounds without

1 reaching the petitioner's underlying constitutional claim, a COA should issue
2 when the prisoner shows, at least, that jurists of reason would find it
3 debatable whether the petition states a valid claim of the denial of a
constitutional right and that jurists of reason would find it debatable whether
the district court was correct in its procedural ruling.

4 Slack v. McDaniel, 529 U.S. 473, 484 (2000).

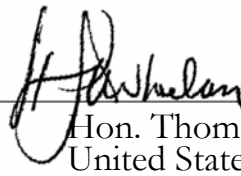
5 Here, the Court never denied the merits of Petitioner's claims because the second
6 amended petition was dismissed without prejudice for failure to pay the \$5 filing fee. And
7 because Petitioner's prison trust account had a balance of \$35.78, no reasonable jurist
8 would find it debatable whether this Court was correct in denying Petitioner's IFP motion.

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10 **II. CONCLUSION & ORDER**

11 For the reasons stated above, the Court **DENIES** Petitioner's motion for a COA.

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13 **IT IS SO ORDERED.**

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15 DATED: July 23, 2009

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18 Hon. Thomas J. Whelan
United States District Judge